

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT ROSSER

v.

SHIRLEY S. CHATER
COMMISSIONER OF THE SOCIAL
SECURITY ADMINISTRATION

Civil Action Number
94-CV-5620

MEMORANDUM

Broderick, J.

March 15, 1999

Plaintiff Robert Rosser filed an application for disability insurance benefits and supplemental security insurance benefits on February 14, 1992. The application was denied initially and on reconsideration by the Secretary. The case was considered de novo by an Administrative Law Judge (ALJ) before whom Plaintiff appeared represented by counsel. After the ALJ determined Plaintiff was not eligible for benefits, the Appeals Council denied Plaintiff's request for review, and Plaintiff appealed to the district court. On August 2, 1995, this Court denied Plaintiff's and Defendant's cross motions for summary judgment, reversed the decision of the Secretary, and remanded the case to the Secretary for further proceedings. By Order dated February 2, 1996, this Court approved a stipulation awarding \$5171.10 in attorney's fees under the Equal Access to Justice Act (EAJA). 28 U.S.C. § 2412(d)(1)(A).

On remand, the ALJ found the Plaintiff disabled and awarded \$26,346.59 in past-due benefits. The agency then approved a fee of \$3500. Plaintiff paid \$3500 for services at the administrative level, and placed \$2586.55 in counsel's trust account "for payment of supplemental fees to the undersigned at such time as the Court may approve this fee motion." Plaintiff's counsel has now applied for additional attorney's fees under 42 U.S.C. § 406(b). Plaintiff's counsel requests a total award of \$7,757.65, reduced by the amount of the earlier

EAJA award \$5171.10, resulting in a payment to Plaintiff's counsel for \$2586.55. The Government has taken no position in this matter. For the reasons outlined below, the Court will approve an attorney award of \$ 3086.85 under § 406(b). However, because of the earlier EAJA award, the § 406(b) award will not result in any payment to Plaintiff's counsel.

Under 42 U.S.C. § 406(b), the district court may award a maximum of twenty-five percent of a claimant's past due benefits to counsel as attorney's fees for services rendered before the court. Only the Social Security Administration (SSA) may award fees for services performed in administrative proceedings. Guido v. Schweiker, 775 F.2d 107, 109-10 (3d Cir. 1985). The total amount awarded by both the court and the SSA may not exceed the twenty-five percent cap. Id. at 108.

When attorney's fees are awarded under both the Social Security Act and the EAJA for the same services, the attorney may keep the larger fee, but must return the smaller fee to the claimant. Poole v. Bowen, 689 F. Supp. 500, 502 (E.D.Pa. 1988). As the note following 28 U.S.C. § 2412 states:

(b) Section 206(b) of the Social Security Act (42 U.S.C. 406 (b)(1)) shall not prevent an award of fees and other expenses under section 2412(d) of title 28, United States Code. Section 206(b)(2) of the Social Security Act shall not apply with respect to any such award but only if, where the claimant's attorney receives fees for the same work under both section 206(b) of that Act and section 2412(d) of title 28, United States Code, the claimant's attorney refund to the claimant the amount of the smaller fee.

28 U.S.C. § 2412 note (1982) as amended by Act of August 5, 1985, Pub.L. No. 99-80 § 3, 99 Stat. 183 (1985). When drafting the present language in the statute, the House Committee commented on the amendment:

It is the Committee's intent that when fee awards are made in Social Security or SSI cases under the EAJA, and provision is also allowed under the Social Security Act for recovery of attorney fees of up to 25% of the claimant's benefits, that the EAJA award should be used as a set off to reduce the payment which the claimant would otherwise owe the attorney. Thus under the amendment an attorney for a Social Security or SSI claimant would be precluded from receiving both the EAJA and Social Security Act fees. Without this amendment, it was argued, "double dipping" was possible. Such double payments are inappropriate and deprive the plaintiff of the benefits intended by the EAJA. Because the Committee is aware of the important function served by counsel in these cases, the Committee permits the attorney to seek recovery under both authorizations. The attorney, however, may keep the larger fee, but must return the amount of the smaller fee to the claimant.

H.R. Rep. No. 99-120, 1st Sess., 20 (1985), reprinted in 1985 U.S.C.C.A.N. 132, 148. Given the language of the note following the statute, and the legislative history, it is clear that judgments obtained under the EAJA shall be credited to the plaintiff in the event that § 406 payments are ordered. This ensures that the plaintiff himself, and not his attorney, receives the benefit of the EAJA award.

In the instant case, Plaintiff was awarded \$26,346.59 in past-due benefits. The total amount awarded by both this Court and the SSA may not exceed \$6586.65, which is twenty-five percent of the past-due benefit award. The SSA has already awarded attorney's fees of \$3,500 for the work performed at the administrative level. Therefore, notwithstanding Plaintiff's counsel's request for \$7757.65 in fees, the maximum amount this Court may award under § 406(b) is \$3086.85.

By order dated February 2, 1996, this Court approved a stipulation awarding \$5171.10 in attorney's fees under the EAJA, and said amount has already been paid to Plaintiff's counsel. This Court will now award attorney's fees for the maximum amount permitted under § 406(b), which is \$3086.85. However, the EAJA amendments require Plaintiff's counsel to refund the

amount of the smaller fee, which is \$3086.85. Rather than allow a \$3086.85 fee and then require Plaintiff's counsel to refund said amount, the Court will not order any amount to be paid by Plaintiff to counsel. See Coup v. Heckler, 834 F.2d 313 (3d Cir. 1987) (noting that EAJA award can moot section 406(b) issues). The amount of \$2586.55, currently held in counsel's trust account shall be refunded to Plaintiff.

An appropriate Order follows.

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ORDER

AND NOW, this day of March, 1999; upon Plaintiff's Motion for Allowance of Attorney Fee under the Social Security Act; for the reasons stated in the Memorandum filed on this date;

IT IS ORDERED:

1. Plaintiff's Motion for Allowance of Fee under the Social Security Act is GRANTED. Counsel is awarded \$3086.85 from Plaintiff's past-due benefits award.
2. All of the allowed amount shall be retained by Plaintiff as a refund due to the Court's earlier EAJA award;
3. Counsel shall distribute to Plaintiff the \$2586.55 in funds held in counsel's trust account.

RAYMOND J. BRODERICK, J.